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11 Attorneys for USACM Liquidating Trust

12 **UNITED STATES BANKRUPTCY COURT**
13 **DISTRICT OF NEVADA**

14 In re:

15 USA COMMERCIAL MORTGAGE
16 COMPANY,

17 Debtor.

18 Case No. BK-S-06-10725-LBR

19 Chapter 11

20 Jointly Administered Under Case No.
21 BK-S-06-10725 LBR

22 **DECLARATION OF GEOFFREY L.
23 BERMAN IN SUPPORT OF
24 MOTION TO APPROVE CLAIMS
25 BASED UPON INVESTMENT IN
26 THE PLACER II LOAN**

27 Date of Hearing: July 26, 2011
28 Time of Hearing: 1:30 p.m.
29 Estimated Time for Hearing: 10 minutes

30 Geoffrey L. Berman declares under penalty of perjury:

31 1. I am an adult person competent to testify in court.

32 2. I make this declaration based upon my personal knowledge, and upon the
33 records USA Commercial Mortgage Company.

34 3. I am the Trustee of the USACM Liquidating Trust (“USACM Trust”),
35 which is an entity created by the Debtors’ Third Amended Joint Chapter 11 Plan of
36 Reorganization (“Plan”), in the jointly-administered bankruptcy cases, In re USA
37 Commercial Mortgage Company, BK-S-06-10725-LBR, pending in the United States
38 Bankruptcy Court for the District of Nevada.

1 4. Around November 2004, USACM circulated an Offer Sheet to prospective
2 Direct Lenders soliciting funding for a “Second Deed Trust Investment” to fund an
3 acquisition and development loan to a borrower identified as “USA Investment Partners,
4 LLC or assignee.” A copy of the Placer II Offer Sheet is attached hereto as **Exhibit B**
5 and incorporated by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed
6 in the Placer II Offer Sheet was \$6,500,000. The loan proceeds were to be used to
7 acquire property for the development of a community in an area approximately twenty
8 miles northeast of Sacramento California, all within a larger specific plan that
9 encompassed five thousand acres, and would ultimately include dwelling units,
10 commercial and business parks, schools, parks, and open space. The Placer II Offer Sheet
11 noted that the investment would be secured by a second deed of trust on approximately
12 338 acres (the “Property”) and repayment would be guaranteed personally by Tom
13 Hantges and Joe Milanowski.

14 5. At the same time that USACM circulated the Placer II Offer Sheet, it also
15 circulated another offer sheet for a “First Trust Deed Investment” related to the same real
16 estate development (the “Placer I Offer Sheet”). The “First Trust Deed Investment”
17 contemplated a \$31,500,000 loan for the acquisition of the Property to “USA Investment
18 Partners, LLC or assignee” (the “Placer I Loan”). The Placer I Loan was to be secured by
19 a first deed of trust on the Property and a personal guaranty from Tom Hantges and Joe
20 Milanowski.

21 6. The Placer II Offer Sheet indicated that the loan would be repaid after the
22 Borrower sold the entire property to one or more merchant builders, upon approval of the
23 site’s specific plan. The Placer II Offer Sheet also indicated that the loan to value ratio
24 would be approximately 60.8% upon completion of the specific plan. The Offer Sheet
25 purported to base the loan to value ratio upon an appraisal that was “in process.” In
26 USACM’s file, there is a December 21, 2004 appraisal from Seevers Jordan

1 Ziegenmeyer, that values the Property as of December 3, 2004. It indicates that the
2 Property had an approximate value of \$33,830,000 and a “hypothetical prospective
3 market value upon final approval of Placer Vineyard Specific Plan” of \$67,660,000.
4 Thus, the loan to value figure provided in the Placer II Offer Sheet appears to be
5 supported by a contemporaneous appraisal.

6 7. On December 10, 2004, Borrower made and delivered to various lenders,
7 including the Placer I Lenders, a “Promissory Note Secured by Deed of Trust” (the
8 “Placer I Note”) and a Loan Agreement related to the Placer I Loan (the “Placer I Loan
9 Agreement”). (Berman Decl., ¶6.) The Placer I Note and Placer I Loan Agreement
10 provided for a loan in the initial principal amount of \$27,500,000, however, the Placer I
11 Loan Agreement provided for an increase in the loan amount up to \$31,500,000. This is
12 the amount ultimately lent to the Borrower by the Placer I Lenders, pursuant to
13 subsequent amendments to the Placer I Loan Agreement and the Placer I Note. The
14 Placer I Note was secured by a document entitled “Deed of Trust, Assignment of Rents,
15 Security Agreement and Fixture Filing” (the “Placer I Deed of Trust”), that was recorded
16 as Document No. 2004-0169766 in the official records of Placer County, California on
17 December 20, 2004. (Berman Decl., ¶ 6.) The Placer I Deed of Trust was the senior lien
18 on the Property. Later loan advances were secured by amendments to the Placer I Deed
19 of Trust likewise recorded in Placer County. (Berman Decl., ¶ 6.)

20 8. Also on December 10, 2004, Borrower made and delivered to various
21 lenders, including the Placer II Lenders identified in **Exhibit A**, a “Promissory Note
22 Secured by Deed of Trust” (the “Placer II Note”) and a Loan Agreement related to the
23 Placer II Loan (the “Placer II Loan Agreement”). (Berman Decl., ¶6.) The Placer II Note
24 and Placer II Loan Agreement provided for a loan in the initial principal amount of
25 \$6,500,000. The Placer II Loan, like the Placer I Loan, was intended to be used to
26 acquire the Property and pay for certain pre-development costs. (Berman Decl., ¶6.) The

1 Placer II Note was secured by a document entitled "Deed of Trust, Assignment of Rents,
2 Security Agreement and Fixture Filing, Second Position" (the "Placer II Deed of Trust"),
3 that was recorded as Document No. 2004-0169767 in the official records of Placer
4 County, California on December 20, 2004. (Berman Decl., ¶ 6.)

5 9. The Placer II Offer Sheet indicates that the Placer II Loan will be
6 guaranteed by the principals of USA Investment Partners, Tom Hantges and Joe
7 Milanowski, and states that they have a combined net worth of approximately \$97 million
8 as of June 30, 2004. Hantges and Milanowski executed personal guarantees. The
9 USACM Trust filed claims in their respective bankruptcy cases. (Berman Decl., ¶ 6.)

10 10. Pursuant to its terms, the Placer I Note and the Placer II Note were
11 scheduled to mature eighteen months after the Deed of Trust was recorded, in May 2006.
12 By then, USACM was a debtor in possession in a chapter 11 bankruptcy. According to
13 the USACM July 31, 2006 "Loan Summary" the Placer I Loan and the Placer II Loan
14 were nonperforming, and USACM records indicate no payments were ever made. By
15 letters dated November 30, 2006, USACM informed Hantges and Milanowski that the
16 loan was in default and they were therefore in default of their guarantees. (Berman
17 Decl., ¶ 6.)

18 11. The Placer I loan documents noted the loan would be supported by a \$6.5
19 Million investment by the Borrower. Tom Hantges and Joe Milanowski, the guarantors
20 on both the Placer I and Placer II loans, were the principals of the Borrower through USA
21 Investment Partner's ownership interests. Unbeknownst to the Placer II Lenders, Tom
22 Hantges and Joe Milanowski used the proceeds from the Placer II Loan to fund their
23 obligations under the Placer I investment documents. The fact that the Placer II loan was
24 the intended equity contribution to support the Placer 1 loan was not disclosed to the
25 investors in the Placer II loan and should have been so disclosed. Had it been disclosed,
26

1 the Trustee believes that many, if not all of the Placer II Lenders, would not have invested
2 in the Placer II Loan.

3 12. According to the USACM July 31, 2006 "Loan Summary" both Loans were
4 nonperforming, and USACM records indicate that the Loan Outstanding Balance at
5 2/28/07 for the Placer I Loan was \$31,500,000, with \$5,602,920 in Interest Outstanding at
6 2/28/07, and \$1,228,292 in Interest Prepaid to Investors, and also indicates that the Loan
7 Outstanding Balance at 2/28/07 for the Placer II Loan was \$6,500,000, with \$1,435,656
8 in Interest Outstanding at 2/28/07, and \$259,999 in Interest Prepaid to Investors.

9 13. Pursuant to the confirmed Plan of Reorganization, the USACM Trust
10 assumed the obligation to service the Placer I and II Loans.¹

11 14. On April 27, 2007, the USACM Trust made demand on the Borrower for
12 payment of the Placer I and II Loans. The Borrower did not make any payments. On May
13 10, 2007, the USACM Trust made demand on the guarantors - Joseph Milanowski and
14 Thomas Hantges, who did not make any payments. The USACM Trust reported monthly
15 to the Lenders² on the status of loan collection efforts and the need for a servicer advance
16 to pay unpaid real estate taxes.

17 15. In June 2007, after consultation with and with the consent of the Lenders, the
18 USACM Trust advanced \$678,649.19 to bring the taxes current on the Property in order
19 that the Property might be included in certain public entitlements approved by the Placer
20 County Board of Supervisors later that month. The taxes were paid and the entitlements
21 were obtained.

22 16. The USACM Trust consulted with the trustee of USA Investment Partners,
23 LLC about the possibility of a sale of the Property for market value, but less than the full
24 payoff due on the Placer I Loan (much less the Placer II Loan). No offer was received by

25 ¹ Notice of Withdrawal of: Motion to Sell Under Section 363 All Commercial Mortgage Assets
26 of Debtor USA Commercial Mortgage Company in the Placer Vineyards Loans [DE 3424].

² <http://usacmcucc.bmcgroup.com/Placer%20County/Forms/AllItems.aspx>.

1 the USA Investment Partners Chapter 11 Trustee. Additionally, a number of Lenders (in
2 both the Placer 1 and 2 loans) opposed the proposition of a sale of the Property for less
3 than all sums due on the Loans, by this time totaled upwards of \$50 million. The
4 USACM Trust ultimately initiated a non-judicial foreclosure sale of the Property.

5 17. As the foreclosure process was ongoing, a number of Lenders acted in
6 concert to question the authority of the Trust to direct the foreclosure sale on behalf of the
7 Placer I Lenders. Accordingly, on October 2, 2008, the USACM Trust filed a complaint
8 against the Borrower and the Direct Lenders, seeking the appointment of a receiver over
9 the Property. The matter came before the Honorable Kent Dawson, United States District
10 Court, District of Nevada, in case number 2:08-cv-01276-KJD-RJJ. On December 16,
11 2008, Elli Mills was appointed as receiver for the Placer I Lenders (the “Receiver”) and
12 authorized to foreclose on the Property.³

13 18. After appointment of the Receiver, a foreclosure sale on the Property
14 occurred on December 22, 2008, upon a \$8,404,030 credit bid, and the trustee’s sale deed
15 was recorded in the Records of Placer County, California. The Receiver continues to
16 market the Property for sale. The amount of the eventual distribution to the Placer I
17 Lenders is unknown, but the Trustee expects any distribution to be well below the value of
18 the principal amount of the Placer I Loan. Further, in light of the status of the
19 bankruptcies for Mr. Hantges and Mr. Milanowski, the Trustee does not believe any
20 meaningful recovery by the Placer II direct lenders on account of their guaranty claims is
21 likely as well. Accordingly, the Trustee does not believe there will be any distribution to
22 the Placer II Lenders but for their share of the Trust’s recoveries on the proposed allowed
23 claims.

24
25
26 ³ The Receiver submits periodic reports to the Placer I Lenders and maintains a website for their
information.

1 I declare under penalty of perjury that the foregoing is true and correct.

2 Dated: June 13, 2011

3 /s/ Geoffrey L. Berman
4 Geoffrey L. Berman

5 Copy of the foregoing (without exhibits)
6 Mailed by First Class postage prepaid
7 U.S. Mail on June 13, 2011 to the
8 Investors in the Placer I Loan listed
on Exhibit A.

9 s/ Matt Burns
10 Matt Burns
Lewis and Roca LLP

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